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SERVICE DATE – DECEMBER 23, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35850

SOO LINE RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Digest:[1] This decision finds that federal law preempts state and local permitting and preclearance requirements and other state and local laws that would prohibit or unreasonably burden or interfere with Canadian Pacific Railway Company's track extension project at its St. Paul, Minn. Yard.

Decided: December 22, 2014

On July 17, 2014, Soo Line Railroad Company, d/b/a Canadian Pacific Railway Company (Soo) filed a petition seeking issuance of a declaratory order to clarify that environmental and other permitting requirements of the State of Minnesota and the City of St. Paul, Minn. (the City) for a track extension project to upgrade Soo's St. Paul yard (the Yard) are preempted under 49 U.S.C. § 10501(b). The purpose of the project is to ease rail congestion in the St. Paul area by allowing Soo to handle longer trains in the Yard and make more efficient use of its main line capacity.

In a reply filed on August 11, 2014, the City asserts that the petition should be denied as moot because it agrees that state and local preclearance and preconstruction permitting requirements are federally preempted for rail facilities like the Yard. Soo sought leave to file a reply to the City's reply on August 15, 2015, along with a reply explaining why it believes that the petition is not moot and that declaratory relief is warranted. On August 28, 2014, the City filed a reply in opposition to Soo's motion for leave to file a reply (the surreply). In the interest of a complete record, we will accept into the record Soo's reply and the City's surreply.

While the City acknowledges that its preclearance regulations and permitting requirements are federally preempted, it has stated that a dispute could arise between it and Soo regarding the extent to which specific state or local requirements that are not preclearance or preconstruction permitting requirements could be applied to this project. Accordingly, we will issue this declaratory order to provide guidance to the parties to the extent the record before us permits.

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

Soo asserts that the City is a major link in the nation's rail system, with a number of rail carriers operating more than 100 trains a day through it. This volume of rail traffic, according to Soo, exceeds current capacity and is projected to increase by as much as 36 % in the next decade. To address the current congestion and delays in the City and resulting delays on other parts of the interstate rail network, Soo intends to upgrade the Yard. The Yard currently has six 7,000 foot long receiving tracks. Soo states that trains longer than 7,000 feet block the main line shared with BNSF Railway Company, causing congestion that lasts until trains are broken down into sections that can be accommodated by the Yard's existing tracks.

To accommodate longer trains more efficiently, Soo seeks to extend the Yard's receiving tracks to 10,000 feet in length. Soo claims that the extended receiving tracks would eliminate the switching operations that are now necessary to accommodate trains that exceed 7,000 feet in length, which would reduce locomotive use, fuel consumption, air emissions, and noise.

According to Soo, prior to its filing here, the City took the position that the construction project required preapproval under the Minnesota Wetlands Conservation Act of 1991 and was also subject to the City's zoning code. Specifically, the City's zoning code, requires a variety of approvals, including: (1) site plan approval; (2) a conditional use permit for filling wetlands and for work in the City's Mississippi River Corridor Overlay District (the Overlay District); (3) a variance to the standards for the Overlay District, including standards for wetlands and steep slopes; and (4) approval for rezoning of a portion of the project area or expansion of a non-conforming use, because the project area is zoned for general industrial use and one-family residential use.

Soo states that, in the spirit of cooperation, it submitted several applications for City approval and participated in an environmental review process with the City, providing the City with extensive information about the project and its environmental impacts. However, the City concluded on June 12, 2014, that an environmental impact statement under the Minnesota Environmental Policy Act should be prepared for the project. Concerned by the resulting delay and burden, Soo filed the instant petition seeking a declaratory order finding the state and local requirements that the City seeks to impose are categorically preempted.

In reply, the City acknowledges that state and local preclearance and preconstruction environmental permitting requirements are preempted with respect to Soo's construction project and that the Petition is moot. The City, however, notes that state and local police powers are not generally preempted and reserves its right to use such powers to enforce Soo's compliance with generally applicable health and safety requirements during or after construction of the expanded yard.[2] The City further acknowledges that, notwithstanding § 10501(b) preemption, a dispute

[2] City Reply at 3-4.

could arise between it and Soo regarding the extent to which specific state or local requirements that are not preclearance or preconstruction permitting requirements could be applied to this project.[3]

In reply, Soo argues that its petition for declaratory order is not moot. It claims that guidance from the Board on the scope of federal preemption is warranted because the City raises the specter that it may use what it terms "generally applicable health and safety requirements or other similar police power requirements" to disrupt or delay the project.[4] In its surreply, the City reiterates that Soo's petition is moot. The City argues that Soo is suggesting that all City police power regulations that might be applied to the Yard are per se preempted. Citing Denver & Rio Grande Railway Historical Foundation—Petition For Declaratory Order (DRGHF), FD 35496, slip op. at 9 (STB served Aug. 18, 2014) ("Localities retain their reserved police powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce."), the City asserts that such an expansion to all police power regulations would be contrary to Board precedent.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction.[5] We have received evidence and argument from the parties on the reach of federal preemption in connection with the project to upgrade the Yard. While the parties do not dispute that local preclearance and preconstruction permitting actions are preempted under § 10501(b) with regard to railroad facilities like the Yard, the parties have not resolved the limits of federal preemption as it pertains to the types of state and local regulation that might be applied to the Yard. Therefore, we will issue this declaratory order to provide guidance to the parties to the extent the record before us permits.

The Interstate Commerce Act (Act) is "among the most pervasive and comprehensive of federal regulatory schemes." Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The Act, as revised by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, expressly provides that the jurisdiction of the Board over "transportation by rail carriers" is "exclusive." 49 U.S.C. § 10501(b). The statute defines "transportation" expansively to encompass any property, facility, structure or equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). Moreover, "railroad" is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C.

[3] Id.

[4] Soo Reply at 2.

[5] See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675, 675 (1989).

§ 10102(6). Section 10501(b) expressly provides that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." Thus, § 10501(b) is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See, e.g., Norfolk S. Ry.—Pet. For Declaratory Order, FD 35701, slip op. at 6 & n.14 (STB served Nov. 4, 2013); H.R. Rep. No. 104-311, at 95-96 (1995).

It is well settled that § 10501(b) preemption prevents states or localities from interfering with matters that are directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment). It also prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier the ability to conduct rail operations. As a result, state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation. See Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005); City of Auburn v. United States, 154 F.3d 1025, 1027-31 (9th Cir. 1998). See also DesertXpress Enters., LLC—Pet. for Declaratory Order, FD 34914 (STB served June 27, 2007) (environmental review under California's state environmental law per se preempted under §10501(b)).

Other state actions may be preempted as applied if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-bound determination. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (federal law preempts "state laws that may reasonably be said to have the effect of managing or governing rail transportation," while permitting "the continued application of laws having a more remote or incidental effect on rail transportation"); Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer (Ayer), 5 S.T.B. 500, 507-508 (2001), recons. denied (STB served Oct. 5, 2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 387-389 (1999).

Not all state and local regulations that affect rail carriers are preempted by § 10501(b). Rather, state and local regulation is appropriate where it does not interfere with rail operations, and localities retain their reserved powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce. Green Mountain, 404 F.3d at 643; DRGHF, slip op. at 9. Thus, the Board has stated that it is reasonable for states and localities to request rail carriers to: (1) share their plans with the community when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin. See Ayer, 5 S.T.B. at 511. Electrical, plumbing, and fire codes also are generally applicable. See Green Mountain, 404 F.3d at 643. States and towns may exercise their traditional police powers over the development of rail

property to the extent that the regulations "protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." Id.

Applying these well-established preemption principles here, we find (as the parties agree) that the environmental and wetlands review and permitting requirements of the State and the City are categorically preempted by § 10501(b) in connection with the project to upgrade the Yard.[6] E.g., Green Mountain; City of Auburn; DesertXpress. We further find that the City may exercise its police powers over the project to the extent that its regulations protect public health and safety and do not unreasonably interfere with or discriminate against rail operations, and provided that its regulations entail no extended or open-ended delays. However, the State and the City cannot use their police powers to indirectly regulate matters reserved to the Board, such as Soo's rates, services, and facilities. And while the State and the City may apply non-discriminatory regulation to protect public health and safety, state and local action must not have the effect of foreclosing or unduly restricting Soo's ability to upgrade the Yard and conduct operations in St. Paul, or otherwise unreasonably burden interstate commerce. CSX Transp. Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005); Green Mountain, 404 F.3d at 643.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Soo's request for leave to file a reply is granted, and its reply, as well as the City's surreply, are accepted into the record.

2. The petition for declaratory order is granted to the extent discussed above.

3. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

[6] City Reply at 3.